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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1115

JOSEPH DE PAOLA, WILLIAM A. JACKSON, JOSEPH A. PLACEK and FRANCIS M. WRIGHT

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Joseph De Paola, William A. Jackson, Joseph A. Placek and Francis M. Wright, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the captioned cases on January 8, 1976.

OPINIONS BELOW

The judgment of the trial court (Federal District Court) is unreported. The opinion of the Fourth

Circuit Court of Appeals, affirming the convictions is an unreported per curiam decision, attached hereto (Exhibit No. 1).

JURISDICTION

The appellate Court's opinion was entered January 8, 1976 (in that Court's Nos. 74-1954; 74-1955 and 74-1956). The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code, and Rule 22(2) of the Supreme Court Rules.

STATEMENT OF CASE

On January 14, 1974, the Grand Jury for the United States District Court for the District of Maryland handed up a sealed indictment charging among others, the Petitioners Joseph C. De Paola, William A. Jackson, Jr., Joseph A. Placek and Francis M. Wright with having violated Title 18 of the United States Code Annotated, Section 1511 & 2 (Conspiracy To Obstruct Maryland Criminal Law to Facilitate an Illegal Gambling Business; Aiding and Abetting).

Prior to or during the trial of the instant case, Defendants Jerome Chernock, Joseph E. Wallace, Edward J. Griffin and Joseph Ernest Mitchell, entered pleas of guilty to the aforementioned indictment. Defendant, Dennis Mello, was granted a separate trial and Defendant, Harry Gonzales' case was dismissed by the Government.

Trial of these cases commenced before the Honorable Herbert F. Murray, with the aid of a

jury on April 29, 1974. On May 25, 1974, the Jury returned a verdict of "guilty" as to all Defendants.

Subsequent to the entry of the jury's verdict, motions for new trial were filed on behalf of the Petitioners De Paola, Jackson, Placek and Wright and such were heard and denied on July 23 and 26, 1974. Thereafter, on July 26, 1974 the Petitioner, Francis M. Wright was sentenced for his conviction on the aforementioned indictment to the custody of the Attorney General or his authorized representative for imprisonment for a period of three and one-half (3 1/2) years; the Petitioner, Joseph A. Placek was sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years; the Petitioner, William A. Jackson, Jr., was sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and the Petitioner, Joseph C. De Paola was sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years. It was after the imposition of the above sentences that Petitioners noted a timely appeal with the Clerk, United States District Court for the District of Maryland. Thereafter, on January 8, 1976, the United States Court of Appeals for the Fourth Circuit affirmed Petitioners' convictions in an unreported per curiam opinion dated January 8, 1976.

STATEMENT OF FACTS

The instant case was called for trial on April 29, 1974, and as its first witnesses, the Government

called the following Special Agents of The Federal Bureau of Investigation: Special Agents William R. Hargreaves, William J. C. Agnew, Jr., Charles F. Begg, II, John Huntley, Jr., Jerry Baston, Charles Lontor, Brian Masterson and P. C. Whitcomb, Jr. The respective testimonies of the aforementioned Agents were primarily designed to elicit their respective expertise in surveilling and investigating an alleged lottery operation which was to have existed at the Diamond Cab Company located at 1920 Ashburton Street, Baltimore, Maryland. Generally speaking, the testimonies of the above-named Special Agents concerned their surveillances and investigations of the area of the Diamond Cab Company commencing on or about June 16, 1972 and continuing under the direction of Special Agent Brian Masterson, until shortly after the instant indictment was handed up by the Grand Jury for the United States District Court for the District of Maryland in January of 1974. It should be noted, that it is the contention of these Petitioners that the alleged lottery operation which the Governement contends existed at the Diamond Cab Company consisted of not one (1) but three (3) separate and distinct lottery operations which included a lottery operation conducted within the confines of the Diamond Cab Company Manifest Room an operation conducted at the Chauffeur's Pleasure Club as well as a separate and distinct operation conducted at the Diamond Cab Lunch Room. The Petitioners, while alleging that there existed the three (3) separate and distinct lottery operations, do concede, that all of the above named operations existed in a geographical proximity one to another.

Special Agent Brian Masterson when called to testify, stated that he was the agent in charge of this investigation whose responsibility it was to direct the entire investigation of the Diamond Cab Operation. (T. 280).

Masterson testified that beginning in May of 1972, Detective Edward Buck of the Inspectional Services Division of the Baltimore City Police Department first began working in an undercover capacity reference the Diamond Cab Operation. It was in mid-August of 1972 that Buck began reporting directly to Agent Masterson (T. 287-288). According to Masterson their combined investigations continued from that time until May of 1973 (T. 289). It was during that period of time that James Milton Thompson and Robert E. Spangler, cooperating members of the Baltimore City Police Department likewise joined in assisting Masterson in his investigation (T. 289).

Masterson related that Officer Thompson's co-operation began on December 21, 1972. It was on that date that Thompson, who later plead guilty to having violated the provisions of Title 18, Section 1511, United States Code Annotated began to co-operate and to report directly to Masterson (T. 293). Thereafter, Thompson, who was admittedly the pick up or bag man for Robert Spangler, began to routinely turn over alleged police payoff or protection monies to Masterson who would record their serial numbers and return same to Thompson with specific instructions regarding what Thompson should then do with these monies (T. 295-297). It was Thompson's

co-operation which according to Masterson eventually resulted in the arrest and subsequent co-operation of Sergeant Robert Spangler on February 2, 1973 (T. 299). Spangler thereafter was directed by Masterson to make various payoffs to members of the Western District of the Baltimore City Police Department (T. 308, 311).

Next, Detective Edward Buck was called as a Government's witness (T. 550). He stated that he is a member of the Inspectional Services Division of the Baltimore City Police Department and that on May 15, 1972 he was specifically assigned to work in an undercover capacity investigating an alleged numbers operation at the Diamond Cab Company (T. 551). Buck related, that on May 16, 1972 he had conversation with a person named Eddie Smith (T. 556). According to Buck, this conversation with Smith eventually led to Buck's meeting with Joseph Wallace at Price's Dairy on May 16, 1972 (T. 559). At that meeting, Wallace was to have recruited Buck into his operation for protection purposes and was thereafter to pay him one-hundred ($100.00) dollars a month for his efforts (T. 560-562). Buck related that during this same meeting Wallace informed him that "he (Wallace) was the man, as he put it, in the operation at the Diamond Cab Company". Wallace was to also have informed Buck that Messrs. Bullock, Griffin and Wilkerson were the persons responsible for managing the operation (T. 560-562). Finally, of the May 16, 1972 meeting Wallace was to have told Buck that he (Wallace) had a large payroll or payoff for Lieutenants in the Western District; however, aside

from the name of Sergeant Robert Spangler, no other police officers names were mentioned at that meeting by Wallace (T. 562).

In June of 1972, Buck was informed by Wallace that on the previous morning a vice squad officer named "Danny or Wright' was in the area of the Diamond Cab Company. According to Buck, Wallace stated that this same vice squad officer had previously conducted a raid on the Chauffeur's Pleasure Club. Buck stated that Wallace was interested in knowing whether this officer was contemplating a second raid (T. 587).

Buck next testified to a June 26, 1972 conversation with Wallace wherein Wallace informed him that a Sergeant Joseph A. Placek had been to the Diamond Lunch Room to ascertain if Wright or any other persons were in this area. According to Wallace "Placek was alright" (T. 595). Continuing, Buck testified that on June 27, 1972 Officer Wright had entered the Manifest Room with an arrest warrant for Edward Griffin (T. 595). According to Wallace, business was beginning to tail off. He said that Griff (Edward Griffin) had to discontinue his operation (T. 597).

Detective Buck next testified to a July 7, 1973 conversation with Wallace concerning Sergeant Spangler's efforts to compromise the Wright situation if and when he would see Wright in the area (T. 600).

A short time after the aforementioned July 7th meeting, Wallace entered the Satellite Convalescent

Home and then the Good Samaritan Hospital. It was during this period of time that of Buck's conversations with Wallace that Buck was informed that Wade (Taylor) was the backer of the operation and that Griff (Edward Griffin) and Joe Bullock were his top men (T. 635).

On October 17, 1972, Buck testified to a meeting he had with Joseph Wallace at the Good Samaritan Hospital where upon his (Buck's) departure from the Hospital he was informed by Joseph Bullock that "Wright had asked to be cut in on the payoff, and they were to start paying Danny on the first of next month, meaning the first of November". (T. 641). While at the Hospital, on that same day, Wallace had informed Buck that Spangler was no longer to be the pick up man for the District, but rather an officer named Bootsie Boy (Officer James Thompson) would take over (T. 640). Two later meetings of October 24, 1972 and October 26, 1972 between Edward Griffin and Buck and Joseph Wallace and Buck again spoke of a prospective payment to Wright of $125.00 per month (T. 642).

On November 28, 1972, Buck testified to a conversation with Joseph Wallace at Wallace's home. It was during this conversation, according to Buck, that Wallace made the following comments:

> "During this conversation Wallace advised me at this time now that Wade was no longer the backer of the operation and that Griff had found a new man. He informed me that this new man was a backer in Brooklyn, and he only called him by the name Jerry.

> Wallace then informed me that the operation was back in progress, with the exception of a few changes, and he said Joe Bullock was no longer with the operation, Bullock quit because of the raids. And at this time June Bug, by the name of Albert Wilkerson, was taking over the operation at the Chauffeur's Pleasure Club. And he informed me how the operation was working at this time, that June Bug would be the man taking the place of Joe Bullock" (T. 655).

Thereafter, on December 21, 1972, Buck testifies to a conversation with Edward Griffin whereat it was decided that Buck would commence picking up the Western District payroll (T. 657).

Finally, the Government concluded the direct testimony of Detective Edward Buck by offering into evidence various tape recorded conversations between Buck and others, Government Exhibits twenty-seven (27) through thirty-seven (37) inclusive (T. 688, 693, 696, 698, 701, 702, 704, 705, 706, 707 & 717).

The Government next called Sergeant Robert Spangler (T. 920). The witness stated that he had been a member of the Baltimore City Police Department for twenty-one (21) years prior to his retirement on July 15, 1973. He had been assigned to the Western District of the Baltimore City Police Department from 1962 until shortly before his retirement (T. 920 and 921). According to Spangler, he was a co-operating witness. His co-operation in the instant case having commenced on February 2, 1973 the day of his arrest by Agents of the Federal Bureau of Investigation. In return for his testimony in this and other unrelated

cases, the Government was to have recommended that he be placed on probation (T. 922).

Spangler stated that he has known Joseph Wallace since sometime in 1958. He testified that, during that year, he and Lieutenant Ethridge had a meeting with Joseph Wallace at the Diamond Cab Company concerning police protection of an alleged gambling operation at that location. Thereafter, arrangements were made for payment of certain police protection monies which he was to have personally picked up and distributed (T. 923 and 924). This system was to have continued until October of 1972 at which time Spangler recruited Officer James Thompson to begin acting as his pick up man (T. 933). According to Spangler the protection money was distributed to the Lieutenants by Lieutenant Stephen Plowman or on occasion Lieutenant Clarence Ethridge. Respecting the Sergeants, payment was made to them directly by Sergeant Spangler except for Sergeant Joseph De Paola who was to have allegedly received his protection money directly from Lieutenant Plowman (T. 938).

Spangler testified that he knows Detective Frank Wright having first met him some months prior to the Fall of 1972 when Wright was assigned to the Western District. According to Spangler, in October of 1972 he and Wright had a conversation at the Western District. During that conversation, Wright was to have allegedly demanded a two-hundred ($200.00) dollar a month payoff from the operators of the Diamond Cab (T. 940). Therafter, Spangler was to have approached Edward Griffin with Wright's request and as a result, in November

of 1972 Wright, according to Spangler was to have begun receiving $125.00 a month from that operation (T. 941). These payments were to have continued until February, 1973 when according to Spangler, Wright approached him and stated that he no longer wanted any money (T. 941). According to Spangler at the time of his arrest on February 2, 1973, the alleged breakdown of the monies from the Diamond Cab Operation were as follows:

> "Seventy ($70.00) Dollars of this money went to Lieutenant Plowman. As I say, Thirty ($30.00) Dollars of it was allegedly to go to Sergeant De Paola. Thirty ($30.00) Dollars to Ethridge. Thirty ($30.00) Dollars to Lieutenant Jackson. Thirty ($30.00) to Watts. Two-hundred ($200.00) to Gundy. Sergeant Placek was to get Forty ($40.00). Gonzales was to get Forty ($40.00). Officer Thompson got Sixty-five ($65.00). Wright got a Hundred ($100.00), and I was to get Sixty ($60.00)." (T. 943).

From the point in time that Spangler was arrested and commenced his co-operation, he began working in an undercover capacity and as a result was to have allegedly engaged in numerous conversations with the Petitioners herein. According to Spangler some, but not all of these conversations were recorded.

On February 13, 1973, Spangler was to have had conversations with Detective Wright and Sergeant Joseph Placek (T. 946, 947). Wright was to have informed Spangler that the F.B.I. had approached Wright respecting Wright's alleged involvement

with the Diamond Cab Operation. According to Spangler, Wright informed them that he had engaged the services of an attorney and that there was nothing that he wished to discuss with them. On that same day, Sergeant Placek was to have told Spangler "the only thing I wanted to see was your body and nothing else" (T. 947). Thereafter, on March 5, 1973, Spangler allegedly met with Lieutenant William Jackson who, " . . . assured me that he didn't mean he didn't want to take the money, only that I should cool it for awhile". On March 13, 1973, Spangler testified to a second meeting with Jackson at which time he was to have given Jackson $70.00, forty of which was for Sergeant Placek (T. 965). Again, according to Spangler, he gave Lieutenant Jackson a $30.00 payoff on April 13, 1973 (T. 978). Finally on April 16, 1973 and May 1, 1973 Spangler testified to various conversations with Sergeant De Paola, Lieutenant Plowman and Lieutenant Jackson whereat Spangler is advised of Placek and Jackson's alleged lack of interest in receiving any further protection monies (T. 982, 983 and 989).

In concluding his direct testimony, Spangler stated that prior to February 2, 1973, he had made distribution to Lieutenant Jackson on three or four occasions, respecting Sergeant Placek, he (Spangler) stated that payments were made every month for approximately one year and concerning De Paola, payments were made over a similar period of time.

In concluding their direct examination of Sergeant Spangler, the Government offered into evidence tape recorded conversations between Joseph Wallace, Steven Plowman, William Jackson

and Joseph De Paola, Government Exhibits 38 through 44 (T. 1072, 1078, 1080, 1090 and 1095).

After the conclusion of Robert Spangler's testimony, the Government then called former Western District Police Officers Sergeant Alfred Gundy, Officer Milton Spencer, and Officer James M. Thompson all of who related their participations in the alleged lottery operation then existing in the area of the Diamond Cab Company as well as their subsequent co-operation with Agents of the Federal Bureau of Investigation.

With the conclusion of Officer Thompson's testimony, the Government rested its case. Thereupon the Court denied defense motions for a judgment of acquittal (T. 1699).

The Petitioners Joseph Placek, William Jackson and Francis Wright (T. 1735, 1827, 1858) all testified in their own defense. In summary, each of the aforementioned Petitioners denied any participation whatsoever on their part in any attempt directly or otherwise to protect any gambling operation at the Diamond Cab Company. Likewise, they individually denied ever having received protection monies from any persons regarding that same alleged gambling operation.

After the conclusion of all defense testimony, their cases were rested and motions for judgment of acquittal were heard and denied (T. 2097-98). Thereafter, the Government called certain rebuttal witnesses (T. 2104-2217). Finally, in sur-rebuttal, Sergeant Joseph De Paola stated that upon his arrest on June 14, 1973, he informed members of the

Federal Bureau of Investigation that he was in fact familiar with the Diamond Cab investigation and in fact had been investigating same on direct orders from Captain Dennis Mello (T. 2218). In rebutting De Paola's claim, the Government recalled Special Agent Robert Twigg who testified that De Paola made no such statement (T. 2231).

Thereafter, defense motions for judgment of acquittal were for a third time heard and denied (T. 2273).

QUESTIONS PRESENTED

1. Were the Petitioners prejudiced becuase the instant indictment charged but one conspiracy when in fact multiple conspiracies were shown to have existed?

2. Was the trial court's failure to instruct on the law of multiple conspiracies when requested to do so by Petitioners' counsel reversible error?

3. Did the trial court err in refusing to apply the sanctions required by the Jencks Act for violation thereof, by which the Petitioners were prejudiced.

4. Were the Petitioners Joseph D. Placek and Francis Wright prejudiced by the Court's refusal to read to the jury on their request not only the selected portions of the direct testimonies of Detective Edward Buck and Sergeant Robert Spangler, but also the appropriate cross-examination of those witnesses?

I.

Robert Spangler, a former Sergeant assigned to the Western District of the Baltimore City Police Department was called by the Government and testified that, prior to his retirement on July 15, 1973, he had been a member of the Baltimore City Police Department for some twenty-one (21) years. More specifically, Spangler stated that he had been assigned to the Western District for approximately ten (10) years prior to the date of his retirement. Spangler related that he was testifying pursuant to an agreement entered into between himself and the Government sometime after his arrest on February 2, 1973. According to Spangler, he stated, that, in return for his "full cooperation" in this case and other cases, the Government would at the time of his sentencing recommend that he be placed on probation (T. 921-22).

Spangler stated that he has known Joseph Wallace since 1968. He related that at some point during the year 1968, he and Lieutenant Clarence Ethridge, also of the Western District met with Joseph Wallace at the Diamond Cab Company, 1920 Ashburton Street. According to Spangler, the purpose of that alleged meeting was to discuss certain payoff arrangements relating to the operation of an alleged lottery operation then existing at the Diamond Cab Company. With regard to that meeting, Spangler gave the following testimony:

> "Q. What, if any, later arrangements were made with Mr. Wallace?
>
> A. There were no later arrangements made

with Mr. Wallace. If an individual came into the District, he would make his own arrangements. As I've said before, there were certain individuals that I did pick up money for, but in those years I just can't recall who they were." (T. 924).

Assuming for the moment that Spangler's testimony regarding his meeting with Joseph Wallace in 1968 is completely creditable as it relates to the information of the nucleus of a Conspiracy to Obstruct Maryland Criminal Laws to Facilitate an Illegal Gambling Business, and also assuming that the Government has shown sufficient proof of fact to establish the existence of an Illegal Gambling Business as defined in Title 18, U.S.C. Section 1955, it is the contention of these individual Petitioners that based on Spangler's aforementioned testimony (T. 925), there existed not one but numerous conspiracies involving Joseph Wallace and various individuals of the Western District of the Baltimore City Police Department. Granted, Spangler did testify that for a period of years from 1968 through October of 1972 he acted as the "bagman" for the Western District (T. 933). In fact, as of February 2, 1973, the date of his arrest, he testified to a payoff breakdown among members of the Western District. According to Spangler the breakdown was as follows:

"Q. If you know, Mr. Spangler, in February -- on or about February 2nd, 1973, how was the money from the Diamond Cab Company being distributed?

A. How was it being distributed?

Q. Yes, sir.

A. This is a complete breakdown, you want?

Q. Yes, sir. If you know.

A. $70.00 of this money went to Lt. Plowman. As I say, $30.00 of it was allegedly to go to Sgt. DePaola. $30.00 to Ethridge. $30.00 to Lt. Jackson. $30.00 to Watts. $200.00 to Gundy. Sgt. Placek was to get 40. Sgt. Gonzales was to get 40. Officer Thompson got 65. Wright got a hundred. And I was to get 60." (T. 943).

Again, conceding the truth of Spangler's testimony as it relates to those individual police officers who he testified to having paid off, a payoff by Spangler to any of these Petitioners does not in and of itself incorporate those persons not a part of the Wallace-Spangler conspiracy into that conspiracy. It should be noted for the purpose of this argument that Spangler gave testimony to having "paid off" each and every one of the Petitioners named herein at various times both prior to and during the course of this investigation.

In support of the Petitioners argument that there existed multiple or individual conspiracies involving police officers and various persons connected with the alleged ongoing gambling operation at the Diamond Cab Company, the Petitioners would direct this Courts attention to the direct testimony of Detective Edward Buck. It was Detective Buck who testified concerning a meeting between himself and Joseph Wallace on May 16, 1972. Buck

was to have met Wallace by prior arrangements in the parking lot of Prices Dairy located in the 6600 block of Liberty Road (T. 560). At the time of this meeting Buck was to have been working in an undercover capacity, investigating with the purpose of infiltrating, if possible, the Diamond Cab Operation. Buck testified that Wallace told him that "he was the man, as he put it, in the operation at the Diamond Cab". (T. 561). According to Buck, Wallace also informed him that "the person who was really in charge of the operation was Joe Bullock . . . and . . . that he had a person known as Griff . . . and a person known as June Bug" (T. 562). Finally, it was during that same conversation that Wallace told Buck that "he had been raided once before and he didn't wish to be raided again, and he suggested that he would give me money each month for protection from downtown, which I agreed upon" (T. 561). That comment, contends the Petitioners is corroborative evidence supporting the fact that although a Conspiracy to Obstruct Maryland Criminal Laws to Facilitate an Illegal Gambling Operation may have existed, such was not a single conspiracy encompassing members of the Spangler--Wallace Group but rather a number of individual conspiracies. If such were not the case, then it would seem absurd that Wallace would negotiate for Buck's protection efforts when in fact Spangler and Company was allegedly being paid to accomplish the same or a similar end (T. 562). Again, as supported by Wallace's attempt to enlist Buck, it is never made known whether or not Spangler, Buck and others were being paid to assure the accomplishment of the same end or if each had responsibilities adverse to the other.

Again in further support of this same contention that individual or multiple conspiracies existed, the Petitioners would refer this Court to the testimony of Robert Spangler at page 968 of the trial transcript. It is there, that Spangler testifies to a meeting with Joseph Wallace on March 30, 1973 at the Mondawmin Shopping Center, Baltimore, Maryland. It was during that meeting that Wallace was to have told Spangler that "he intended to return to action" and that he (Wallace) wanted a figure from Spangler. Spangler responded by saying that he had not seen all of the people involved. Again, in this conversation their is additional support of the fact that Wallace was involved with officers of the Western District on an individual rather then a collective basis.

Despite the fact that Spangler's testimony and recorded conversations, indicated that each of the Petitioners at various times had been paid protection monies, There was never any mention made by Spangler or any other Government witness as to the alleged reason for such payments. Therefore, it could then be assumed that such payments to Petitioners, if made at all, could have been made for many reasons and not necessarily to protect the Diamond Cab Operation. Therefore, without relinquishing their argument that there existed at the Diamond Cab numerous conspiracies, the Petitioners contend that numerous concpiracies also existed vis a vis Joseph Wallace and the various members of the Western District of the Baltimore City Police Department. Since at no time was any conspiratorial interrelationship ever shown to have existed collectively between these Petitioners and Joseph Wallace, the Petitioners contend that the

evidence was not only insufficient to connect these Petitioners with the conspiracy named in the indictment, but equally as important, if this Court felt that it was proper for the trial court to have submitted the case to the jury for their determination, then it should have been with the clarifying instruction as to the law of multiple conspiracies.

As a continuation of the Petitioners argument that the Government proved the existence of multiple conspiracies in their case in chief, the Petitioners would have this Honorable Court again look to the testimonies of the various Government witnesses. The Petitioners argue that the cross examination of Robert Spangler in and of itself shows sufficient proof of the fact that the overall scheme of police protection existed not only on an individual basis among police officers as previously argued, but moreover, was shown to have existed within the geographical make up of the Diamond Cab, Diamond Lunch and Chauffeurs Pleasure Club. At pages 1218 through 1222 of the trial transcript Spangler stated that although he would never believe anything that Wallace told him, based on what Wallace said, there existed at least three (3) separate gambling operations in the general area referred to as the Diamond Cab Company, those being the Lunch Room, the Manifest Room and the Pleasure Club.

Likewise, the testimony of Detective Buck also showed that not only did various individuals enter and leave the Diamond Cab Complex over the course of its existence, but also to the formation and discontinuance of operations called to within Diamond Cab Operation but which in fact were separate

and distinct conspiracies. At page 597 of the transcript, Detective Buck related the following concerning his conversation with Joseph Wallace on June 28, 1972.

> "Q. Directing your attention to June 28, 1972, did you have a conversation with Mr. Wallace on that particular day?
>
> A. Yes, sir.
>
> Q. What happened on that particular day?
>
> A. I met with Wallace again in the Diamond Cab Company lunchroom, and he informed me that business was bad because the players were afraid to come around because of Danny Wright's checking the area. He said business would go back to normal as soon as the indicent was forgotten; however, he said Griff had to discontinue his operation. And I went over to the Manifest Room, because I knew the way that Griff did operate and --".

Here then is evidence that Edward Griffin and Joseph Wallace headed and operated two (2) separate and distinct operations. Perhaps the Petitioners and the rest of the Western District in working for these persons did so to accomplish a like result, but nevertheless, if such was the case, it was done to service the ends of more than one conspiracy.

Further along in the testimony of Detective Buck, he calls to a subsequent meeting with Joseph Wallace at Wallace's home, 5607 Old Court Road on December 20, 1972. Of that meeting, Buck gave the following report:

"BY MR. ANDERSON:

Q. Mr. Buck, directing your attention to December the 20th, 1972, did you conduct an investigation on that particular day, sir?

A. Yes, sir.

Q. Can you tell us what happened on December 20, 1972?

A. I met with Wallace again at his home, 5607 Old Court Road, Apartment 102, we had a conversation and during this conversation Wallace advised me at this time now that Wade was no longer the backer of the operation and that Griff had found a new man. He informed me that this new man was a backer in Brooklyn, and he only called him by the name Jerry. Wallace then informed me that the operation was back in progress, with the exception of a few changes, and he said Joe Bullock was no longer with the operation, Bullock quit because of the raids. And at this time June Bug, by the name of Albert Wilkerson, was taking over the operation at the Chauffeur's Pleasure Club. And he informed me how the operation was working at this time, that June Bug would be the man taking the place of Joe Bullock" (T. 655).

From that conversation we again hear Wallace speak of the Chauffeur's Pleasure Club as a separate operation. Wallace allegedly was to

have told Buck that a backer from Brooklyn, Maryland was then the backer of "the Operation". He informed Buck that Wade was no longer "the backer of the operation" that Joe Bullock had quit and that Albert Wilkerson "was taking over the operation at the Chauffeur's Pleasure Club. Again, as supported by this conversation with Wallace there seems to be sufficient proof of fact that existing at the Diamond Cab Company was several separate and distinct conspiracies. Perhaps Joseph Wallace was privy to the workings of all of the gambling operations located in and around the Diamond Cab Company, but this familiarity which he seemed to display with the various operations (Diamond Cab, Diamond Lunch and Chauffeur's Pleasure Club) and backers (himself, Joseph Bullock, Wade Taylor, Edward Griffin, Albert Wilkerson and Jerry from Brooklyn) shows not one but at least several distinct operations protected if at all by three distinct sets of conspirators. Even though those persons who were being paid may have been aware of the existence and purposes of these other operations, to be sure more than one operation was shown to have existed.

Finally, Special Agent T. C. Whitcomb, a witness offered by the Government as an expert in the field of gambling paraphernalia testified on cross examination as follows:

"Q. And is it not also true that you indicated in your report that these exhibits cue 1 through cue 5, which are known as Government's Exhibits 13, 14, 16, 17 and 18, bears no relationship to the other exhibits that you have looked at that were taken from

> the Diamond Cab Manifest Room and the Chauffeur's Pleasure Club? And if I -- I ask you to look on the last page of your report.
>
> A. Yes, sir." (T. 513).

Agent Whitcomb later qualified his answer by saying that he "found no direct relationship" between the exhibits seized from the Manifest Room and those seized from the Pleasure Club. He stated that because he found no direct relationship that did not necessarily mean that they were not unconnected. According to Whitcomb, the records could have been connected but he could show no proof direct or otherwise to establish such connection (T. 514).

Counsel for the Petitioners is congnizant that it is perhaps unfair to single out selected portions of any witness' individual testimony and to rely upon it to establish the proof of his argument; however, even in attempting to keep the entire testimonies of all of the witnesses in their proper perspective, the Petitioners contend that unquestionably separate and distinct conspiracies were proven to have existed at the Diamond Cab Company.

In the case of U.S. vs. Varelli, et al, 407 F. 2d 735, 742 it was said:

> "While the parties to the agreement must know of each other's existence, they need not know each other's identity nor need there be direct contact. The agreement may continue for a long period

> of time and include the performance of many transactions. New parties may join the agreement at any time while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies. Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920, 922-35 (1959).
>
> The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy".

In the instant case, although the Petitioners may have been charged with having acted to further the same overall common design or purpose as did the group led by Spangler, they did so, if at all, on an individual basis and as previously argued without concern for either the Spangler group or any of the other gambling operations proven to have existed. Therefore to hold these Petitioners individually responsible for the words, deeds and acts of the

other individual conspirators and groups of conspirators would not only equal a substantial variance, but equally as important would create substantial prejudice to the trial of his case.

As stated in the Kotteakos decision the individual groups of conspirators and individual or separate conspiracies of which the Petitioners were at best separate and unrelated parts were "separate spokes meeting in a common center, though we may add, without the rim of the wheel to enclose the spokes". Kotteakos vs. United States, 328 U.S. 750, 755. Here no evidence was produced to connect their overall efforts. In fact, a review of all of the evidence produced at the trial of this case showed nothing to even prove that each group was united toward accomplishing a single criminal objective. Blumenthal vs. United States, 332 U.S. 539. This is not a situation as in United States vs. Wenzel where different groups played different parts in accomplishing a single or united criminal objective. This is more an example of the wheel type conspiracy where different groups (Wallace, Griffin, Wade, Wilkerson and Jerry from Brooklyn) have formed their own independent united fronts (spokes) in the overall Diamond Cab Concept (wheel). Each independent of the others existence and each not dependent on the other in achieving its criminal objective.

This Court has pointed to the conspiratorial purpose in determining the number of conspiracies proved: "To unite them in a single conspiracy it is only necessary that the activities of each individual or group be directed toward accomplishing a single criminal objective." United States vs.

Wenzel, 311 2d 164 (4th Cir. 1962). But there is no single conspiracy where the Government's proof shows "the absence of an indispensable ingredient of a conspiracy: that the accused persons must have had a common aim". United States vs. Goss, 329 F. 2d 180, 183 (4th Cir. 1964).

From the facts in the case here, it cannot be seriously argued by the Government that the entirely distinct conspiracies described in the testimony were "directed toward accomplishing a single criminal objective," United States vs. Wenzel, supra at 167; or that the conspirators "had a common aim," United States vs. Goss, supra at 183. Nor can it be said that there was an "overall goal or common purpose" or "one overall scheme". United States vs. Varelli, supra at 742. The essence of the conspiracy is the nature of the agreement among the conspirators, and whatever else the Government may say about interrelationships of parties it cannot be said that there was but one agreement in this case.

Petitioners submit that their conviction below, based as it is upon a prejudicial variance between indictment and proof and upon the misjoinder of distinct conspiracies, must be reversed. In United States vs. Goss, supra at 184, this Court held that appropriate relief should have been granted by the trial court in circumstances such as these. The options suggested were to order an election by the Government of the conspiracy it would prosecute, to direct a severance of defendants and offenses, or to order a new trial. The trial court's failure to grant some such relief here was reversible error.

II.

Seeking to salvage some relief from a clearly prejudicial situation, counsel for the Petitioners requested the court to instruct the jury with respect to the possibility of separate conspiracies and the legal effect if the jury were to so find (T. 2469). At the very least that issue should have been submitted to the jury under proper instructions. "Since the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several." United States vs. Varelli, 407 F. 2d 735 (7th Cir. 1969). Thus, when the possibility of a variance appears, the trial judge should instruct the jury on multiple conspiracies. Id. at 746. See also Kotteakos vs. United States, 328 U.S. 750 (1946), in which the Supreme Court suggested that giving a precautionary instruction would be appropriate, and perhaps required, in cases where related but separate conspiracies are tried together. In such situations, the evidence relating to each conspiracy would have to be considered by the jury separately from that relating to each other conspiracy. Id. at 769-70.

By contrast, in United States vs. Goss, 329 F. 2d 180 (4th Cir. 1964), the trial judge recognized the plurality of conspiracies and "instructed the jury in regard to their duty should they find that 'two or more conspiracies have been proved'." Id. at 183. Even though the jury was instructed, the convictions in Goss were reversed because, just as here, the variance had created an impermissible joinder under Rule 8(b), F.R. Crim. P.

It is doubtful whether the requested jury instructions could have cured the prejudice, but, in any event, Judge Murray refused to include those instructions in his charge. Not only was the jury not instructed on the possibility of separate conspiracies, but also, taken as a whole, the charge treats the conspiracy counts as if each charged but a single conspiracy. This only compounded the error.

For this reason, therefore, the Petitioners contends that their conviction should be reversed.

III.

The Petitioners were convicted in the United States District Court for the District of Maryland on Friday, May 24, 1974. Prior to the date of their conviction, the Petitioners had demanded and were subsequently provided requested Jencks materials under the provision, Title 18 USC Section 3500. The Government, in supplying the Petitioners these Jencks materials, so informed them that such was the entire amount of the discoverable Jencks material to which they were entitled under the aforementioned provisions of Title 18 USC Section 3500.

Subsequent to the conclusion of the instant case, Counsel for the Petitioners commenced the trial of the case entitled the United States of America vs. John Daniel Dobbins, et al on May 28, 1974 in the United States District Court for the District of Maryland, the Honorable Joseph H. Young presiding (No. 73-0679Y). During the

course of the Dobbins trial, information relevant to these Petitioners was brought to the attention of Petitioners' counsel. As a result, counsel for the Petitioners made such information the basis of their Supplemental Motion For New Trial filed with the trial court in this case on June 24, 1974. On July 26, 1974 the Honorable Herbert F. Murray entered an Order denying the Petitioners' Supplemental Motion For New Trial. The basis of argument on which the Petitioners relied and the facts contained therein are now reiterated by the Petitioners as additional grounds for this Court's consideration of the Petitioners request for a new trial.

In the trial of the instant case, Officer Milton Spencer and Sergeant Alfred E. Gundy, both former members of the Western District of the Baltimore City Police Department appeared and testified as Government witnesses. At no time during the course of their testimony or for that matter after the conclusion of their testimony were any transcripts relevant to their testimony before the Special Federal Grand Jury who eventually handed up an indictment against the individual Petitioners herein, ever given to counsel for the Petitioners, (Exhibits 1 and 2 respectively, Petitioners Supplemental Motion For New Trial). Additionally, it was raised during the Petitioners Supplemental Motion For New Trial that their trial counsel was never supplied at any time during the trial of their cases, two (2) conversations between Captain Dennis Mello (former Western District Captain, who was indicted along with these Petitioners, but whose trial was severed from the trial of their case) and Superior Officers of Captain Mello employed

by the Baltimore City Police Department (Exhibit #3, Petitioners Supplemental Motion For New Trial). Within the documents described as Petitioners' Exhibit #3 in their Supplemental Motion For New Trial, is contained documentation by which Captain Mello stated that he had employed part time police personnel at the Diamond Cab Company in an undercover operation without anyone's knowledge. Additionally, Captain Mello was to have said that he possessed further documentation which would have been supportive of those conversations and his statements contained therein regarding his employment of undercover personnel at the Diamond Cab Company.

Officer Milton Spencer, when called to testify before the Specially Constituted Grand Jury, indicated that not only he but also Sergeant Robert Spangler, the Government's chief prosecution witness in the instant case, had prior knowledge of the fact that Captain Dennis Mello had been for some years receiving payoff protection monies from various numbers operations located in the City of Baltimore. Specifically, Officer Spencer testified to a conversation he had with Sergeant Robert Spangler sometime in 1969 at which time he approached Sergeant Spangler and informed him that Captain Mello was complaining because he was not receiving his monies from the various numbers operations. According to Spencer, Sergeant Spangler was to have told him, "I'll see you later". (Exhibit #1, pages 39 and 40 of Petitioners Supplemental Motion For New Trial).

During the course of the trial of the instant case, Sergeant Spangler testified that he was un-

aware of any involvement or culpability of Captain Mello respecting an alleged numbers operation existing at the Diamond Cab Company. Certainly, had counsel for the Petitioners been supplied with the subject information contained in the testimony of Officer Milton Spencer before the Special Grand Jury, they would have, through counsel been better able to cross-examine not only Officer Milton Spencer, but more importantly, Sergeant Robert Spangler who, without question was the Government's key prosecutorial witness in the trial of the Petitioners cases.

Sergeant Alfred E. Gundy was likewise called to testify before the Specially Constituted Federal Grand Jury regarding information relevant to the Diamond Cab Operation. The testimony of Sergeant Gundy before the Grand Jury was likewise never furnished counsel for the Petitioners at any time during the trial of the instant case. The substance of the testimony of Sergeant Alfred Gundy, the Petitioners contend would have been most important to their cross-examination of the fact that not only Sergeant Gundy but also Sergeant Spangler was involved in a separate independent numbers operation located at the Club Astoria which operation as called to in the trial of the Dobbins case was known as the Dobbins-Harrington-Red Charles Operation. The testimony of Sergeant Gundy regarding the Club Astoria Operation was that Captain Dennis Mello, Lieutenant Clarence Ethridge, Officer Milton Spencer, Officer Joseph Mitchell and Sergeant Gundy himself received a total amount of $250.00 a month for the protection of that operation (Exhibit #2, Petitioners Supplemental Motion For New Trial, page 9 and 10). It should be noted that none of the

Petitioners herein were never mentioned by Sergeant Gundy as ever being the recipients of any of the protection monies received from the Club Astoria Operation. For that reason, had the information regarding Sergeant Gundy's testimony before the Special Grand Jury been made known to these Petitioners, they may not have elected to continue in their agreement with both the prosecution and the Court to abstain from entering into areas of questioning other than the specifics of the Diamond Cab Operation, but rather may have elected to use such information in cross-examining these Government witnesses. The effectiveness of the use of Sergeant Gundy's statement as contained in his Grand Jury testimony could have only been construed to have been beneficial to the trial of the Petitioners cases. It is for this reason, that the Government's refusal or neglect to provide such information, to these Petitioners was most prejudicial to the defense of their cases.

During the course of the Petitioners trial, testimony was produced before the Court that for a period of time, the Diamond Cab Operation was taken over by an individual known as "Jerry from Brooklyn" (T. 1363). Contained in Petitioners Argument #1 concerning the law of multiple conspiracies, the Petitioners alleged that the operation of the gentleman known as "Jerry from Brooklyn" was an independent and separate operation from that of the Diamond Cab Operation. Sergeant Gundy during the course of his Grand Jury testimony was asked if he could supply the names of gambling operations other than the Dobbins Operation from which he was collecting money on behalf of himself

and Captain Mello. The witness mentioned six separate and distinct gambling operations. One of those mentioned was the Diamond Cab Operation. A second separate and distinct operation was that of Jerome Chernock who was called "the man at North and Fulton". Jerome Chernock is none other than "Jerry from Brooklyn" and in fact operated a Used Car and Salvage Operation in a community known as Brooklyn, Maryland (Exhibit #2, Petitioners Supplemental Motion For New Trial, page 28). Finally and for the same reasons as applied to the Government's failure to produce the testimonies of Officers Spencer and Sergeant Gundy, the Petitioners contend that they were equally prejudiced by the Government's failure to produce Exhibit #3 which consisted of one document containing two conversations, dated June 14, 1973 and June 18, 1973 between Captain Dennis Mello and his Superior Officers of the Baltimore City Police Department. (It should be noted that Petitioners Exhibit #3 is in fact an exact transcription of the conversations of June 18 and June 24, 1973).

With regard to those aforementioned conversations, it should be noted that Captain Mello informed Lieutenant Frank J. Serra of the Baltimore City Police Department on June 14, 1973 that rumor had it in the Western District, directly prior to that date, that Sergeant Joseph Placek, a Petitioner herein, and Sergeant Cason brought to him information that Sergeant Spangler was inquiring around the District as to whether or not Captain Mello was a "bagman". Sergeant Spangler was confronted by Captain Mello and among other comments, Sergeant Spangler said, "If he goes, everybody goes." Sergeant Spangler further intimated that everybody

was going down "all but the Captain" (Exhibit #3 Supplemental Motion For New Trial, page 3).

If the Petitioners had the benefit of these conversations, Captain Mello could have been called as a witness to impeach Sergeant Spangler and to further corroborate the testimony of Officer John Burns of the Western District who also testified that on two occasions, he overheard Sergeant Spangler make similar comments as those commented upon by Captain Mello in Exhibit #3 (T. 1933). Additionally, these comments would also serve as an additional contradiction of the testimony of Officer Milton Spencer before the Special Grand Jury noted heretofore and contained in Petitioners Exhibit #1.

Captain Mello further stated in the conversation of June 14, 1973 in referring to the Diamond Cab Operation that he "put people in there without anyone knowing it". (Exhibit #3, Petitioners Supplemental Motion For New Trial, page 4). Thereafter, in the conversation of June 18, 1973 with Commissioner Pomerleau, Captain Mello indicated that he tried to correct the problems in his District and that he was personally responsible for same, indicating that he had "95's in his file" (Exhibit #3, Petitioners Supplemental Motion For New Trial, page 5, conversation of June 18, 1973). 95's are police reports concerning the investigations of the alleged gambling operations in the Western District which included the Diamond Cab Operation.

Such information, as gleaned from Exhibit #3, supported Sergeant DePaola's testimony and allegations throughout the trial that Captain Mello

had assigned him to work as an undercover policeman to ferret out the gambling operations which were prevalent in the Western District, including the Diamond Cab Operation. This additionally corroborates Sergeant DePaola's testimony and surrebuttal that no one else within the District other than Captain Mello knew of his undercover work. Not only would this information have been of special use to Sergeant DePaola in the defense of his case but likewise would have been of much use for the remaining Petitioners herein throughout the course of their defense. The reason there being is that, since a severance was not granted to any of the Petitioners in these cases, regardless of the court's instructions that each defendant's case should be separately adjudicated, the joint trial for all of these Petitioners resulted in the Jury's tarring all the Petitioners with the same brush.

If the Court read the entire transcripts of the conversations contained in Exhibit #3, it would find the comments expressed therein showed confidence by Captain Mello's superior in his integrity. Obviously, the Petitioners, had they been aware of such conversations, would have been in a far better position to make the election whether or not to call Captain Dennis Mello as their own witness in the defense of their cases.

The Petitioners in support of the aforementioned argument and factual information contained therein cite to the Court that generally such is supported in a decision of Brady vs. Maryland, 373 U.S. 83 (1963) in that the Government failed to provide the defense in this case with information which was exculpatory to each of the

Petitioners severally and all of the Petitioners collectively. The leading Fourth Circuit case on this issue is United States vs. Missler, 414 F. 2d 1293, 1303, 1304 (1969).

In sharp contrast to Missler, it would be sheer speculation here to conclude that the Government's failure to produce had caused no prejudice to the defense. Certainly, an absence of prejudice cannot be said to be "perfectly clear". What is perfectly clear, we submit, is that the defense was prejudiced. Here, since it is perfectly clear that the defense was prejudiced by the omissions, reversal is indicated. The conviction, therefore, should be reversed, and on this ground alone the case should be remanded for a new trial.

IV.

On Thursday, May 23, 1974, the Jury began their deliberations on the case. At approximately 10:00 p. m. on the evening of May 23, 1974, the Court concluded the Jury's deliberations for that evening and sequestered them until the following morning at 9:00 a. m.

On Friday, May 24, 1974 the Jury again resumed its deliberations. At 8:35 p. m. a note was received from the foreman of the Jury. The note requested that the Court replay to the Jury the tape recording between Lieutenant Plowman and Sergeant Spangler regarding the sudden refusal of two police officers to accept their payoff. Also, the note requested to have re-read to the Jury the transcript of the testimony of Detective Edward Buck

regarding a check of the Diamond Cab area for Detective Francis Wright's presence there and also the transcript of the testimony of Sergeant Robert Spangler regarding the distribution of money to members of the Western District (T. 2540). Counsel for the Petitioners noted an objection to the Court reading the direct testimony of any witnesses' testimony to the Jury in response to their question without reading to them the appropriate passages of that witness's cross examination (T. 2543). Furthermore, counsel for the Petitioners reminded the Court at page 2546 of the transcript that in its discretion it might be far better to read none of the testimony to the Jurors or in effect not to fulfill their request, rather than to refuse to read the cross examination of any of the witnesses testimony who were the subjects of the jury's questions. The trial court in overruling the Petitioners request reminded the members of the jury in a cautionary instruction "that one of the problems involved in doing this is that it tends to select or isolate out of the whole spectrum of testimony one small piece or fragment of it. And this, to a degree, may have a tendency to highlight or emphasize a small portion over the whole of that witness' testimony." (T. 2550 and 51).

Following the Court's cautionary instruction, excerpts of the testimony of Detective Edward Buck of Monday, May 6, 1974 was read to the Jury. Thereafter an excerpt from the testimony of Sergeant Robert Spangler of May 9, 1974 was also read to the Jury. On each occasion, the Court, as previously indicated overruled Petitioners' counsel's request to also read to the Jury excerpts from the cross examination of those two aforementioned witnesses.

At 10:07 p.m. the Jury again returned to the Court Room and the foreman handed another note to the Court requesting whether Sergeant Spangler testified that he directly paid monies to Mr. Wright at any time. Thereupon, a similar request was made by Petitioners' counsel that the cross examination of Sergeant Spangler regarding that issue of payoff monies also be read to the Jury (T. 2560 and 61). On this occasion, the Court did acquiesce in counsel'f request and did allow that the testimony of the cross examination of Sergeant Spangler regarding this issue be read to the Jury.

Although the Petitioners are cognizant of the fact that in certain instances the Court in its discretion may read the direct testimony of any witness upon request without having to read the cross examination of that witness' testimony to the jury, nevertheless, the Petitioners contend that in some factual situations as here, the Court's failure to read the complete testimony of the witness is highly prejudicial in that it not only highlights the direct testimony of that witness that has been read to the jury, but also fails to adequately apprise the jury of the entire testimony of any given witness. Such a request, that testimony regarding cross examination be read as well as direct examination becomes more important and more an issue of fundamental fairness in the trial of any given case when we consider the length and complexity of the case in question. In fact, the Petitioners contend that Court's refusal in this regard resulted in singling out or highlighting the requested testimony of the witnesses, and so contend the Petitioners, it would have been far better to have refused to review any of the testimony

requested by the jury than to have read to them only selected portions of that witness' direct testimony (89 C. J. S., Section 479).

Although it is clear from the case law that the trial judge has the authority to exercise his discretionary powers in passing upon the various requests of counsel including one of this nature, the Petitioners contend, that we are not here confronted with a case that extended over a trial period of two or three days, but one that extended over a trial period of two or three weeks. For that reason, it seems more than obvious that not only did the jury not recollect whether or not a particular witness gave testimony to a particular point or fact e.g., whether or not Sergeant Spangler ever directly paid monies to Detective Wright, but equally as important, if the Jury was unable to remember the specifics of the witness' direct testimony then without question, they would not have been able to remember any of the specifics of his cross examination either. Therefore, in all fairness and despite the holdings of the United States vs. Hurst, 436 F. 2d 1092 (5th Cir. 1971) and the United States vs. Rosenberg, 195 F. 2d 583 (2nd Cir. 1952), the Court clearly abused its discretionary power in refusing the Petitioners' request that the cross examination of Detective Edward Buck and Sergeant Spangler be read to the Jurors along with the direct testimony of those witnesses. United States vs. Raab, 453 F. 2d 1012 (3rd Cir. 1971); United States vs. Jackson, 257 F. 2d 41 (3rd Cir. 1958 and Henry vs. United States, 204 F. 2d 817 (6th Cir. 1953).

CONCLUSION

For the reasons stated in argument the Petition for Certiorari should be granted.

Respectfully submitted,

HAROLD I. GLASER
RICHARD M. KARCESKI

Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK JR. CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1115

JOSEPH DE PAOLA, WILLIAM A. JACKSON, JOSEPH A. PLACEK and FRANCIS M. WRIGHT

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITIONERS' APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1954

UNITED STATES OF AMERICA Appellee,

vs.

William A. Jackson, Jr.
Joseph A. Placek
Francis M. Wright, Appellants.

No. 74-1955

UNITED STATES OF AMERICA Appellee,

vs.

Timothy O. Watts, Appellant.

No. 74-1956

UNITED STATES OF AMERICA, Appellee,

vs.

Joseph C. DePaola, Appellant.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Herbert F. Murray, District Judge.

(Argued November 14, 1975. Decided - Jan. 8, 1976)

Before Haynsworth, Chief Judge, and Butzner and
Widener, Circuit Judges.

Harold I. Glaser for William A. Jackson, Jr., Joseph A. Placek, Francis M. Wright, and Joseph C. DePaola; Howard Heneson (court-appointed counsel) (Harold I. Glaser and Richard M. Karceski on brief) for Timothy O. Watts; Gerald P. Martin, Assistant United States Attorney, (Jervis S. Finney, United States Attorney for the District of Maryland, and James E. Anderson, Assistant United States Attorney, on brief) for appellee.

PER CURIAM:

Several members of the Baltimore Police Department appeal their convictions for conspiring to obstruct the criminal laws of Maryland with intent to facilitate an illegal gambling business, in violation of 18 U.S.C. § 1511. They contend that the government charged them with participation in a single conspiracy and then proved multiple conspiracies to their prejudice, that they were denied Jencks Act information, that the district court's refusal to read portions of the transcript to the jury erroneously highlighted the government's case, and that the court improperly denied a severance. We affirm.

The indictment alleged that the appellants and other members of the police department received money from gamblers in return for not enforcing state gambling laws. Appellants claim that the evidence showed the existence of several distinct gambling operations with separate protection arrangements, and not the single conspiracy charged in the indictment.

The evidence does not support the appellants' contention. Although the identity of the conspirators changed over time, all were involved in related gambling activities. Moreover, a single "bag man" distributed the bribes to the other police officers. We conclude, therefore, that rather than showing several distinct conspiracies, as in Kotteakos vs. United States, 328 U.S. 750 (1946), the government established the existence of one scheme. That there

may have been several branches of the conspiracy does not alter its unitary character. See Blumenthal v. United States, 332 U.S. 539 (1947).[1] Since the evidence showed only one conspiracy, the district judge properly refused to instruct the jury on the law of multiple conspiracies. See United States v. Nickels, 502 F. 2d 1173, 1178 (7th Cir. 1974).

Although the government produced Jencks Act material for the defense, it inadvertently did not include the grand jury testimony of two witnesses. Appellants contend that this violated the Act, 18 U.S.C. § 3500. Applying the strict standard established in United States v. Missler, 414 F. 2d 1293, 1303-04 (4th Cir. 1969), we find that any lack of disclosure was harmless. Information substantially the same as that contained in the grand jury testimony was furnished the appellants from other sources, and the effective cross-examination of the two witnesses demonstrated that the absence of the grand jury testimony did not prejudice them.

Similarly, the government's failure to provide the defense with a police captain's grand jury testimony did not violate the principles established in Brady v. Maryland, 373 U.S. 83 (1963). The

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1. Similar contentions were raised in a related, unpublished, case, where we also concluded that the evidence did not show multiple conspiracies. United States v. Goodrich, No. 74-2399 (4th Cir., Sept. 23, 1975).

captain testified before the grand jury that there were undercover agents investigating these gambling operations, but he never identified the agents. He did not testify at the trial. There is no indication that his grand jury testimony would exculpate these defendants, and the government was not obliged to produce it.

The jury made several requests during its deliberations for a tape and certain testimony. The court granted these requests, but the appellants objected unless the witnesses' cross-examination was furnished as well. With one exception, the district court refused to repeat the cross-examination to the jury.

We find no reversible error in these rulings. It is ordinarily not an abuse of discretion for the court to limit the repetition of evidence to the jury's request. ABA, Standards Relating to Trial by Jury § 5.2 (App. Draft 1968). In this case, we cannot say that the court abused its discretion in refusing the appellants' requests. The cross-examination was lengthy and often reiterated answers adduced the jury to consider the repeated material in the context of the witnesses' entire testimony.

Finally, appellant Watts claims that the trial court's denial of his motion to sever his trial under Fed. R. Crim. P. 14 denied him a fair trial. He contends that very little of the government's evidence related to him and that the jury was unable to properly separate it from the voluminous evidence about his co-defendants. He also argues that his co-defendants' defenses were antagonistic

to his. The government presented ample evidence to prove Watts' participation in the conspiracy. That he did not participate to the extent of his co-defendants does not automoatically justify a severance. See United States v. Somers, 496 F. 2d 723, 730 (3d Cir. 1974). A separate trial would have required the government to repeat much of the evidence presented at this four week trial. The trial court did not abuse its discretion in refusing to sever Watts' trial. United States v. Frazier, 394 F. 2d 258 (4th Cir. 1968).

The judgment of the district court is affirmed.